IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CRI-2010-063-000751

THE QUEEN

v

GAVIN HORUA

Hearing: 12 August 2011

Counsel: A Gordon for the Crown
W L Lawson for the prisoner

Judgment: 12 August 2011

SENTENCING REMARKS OF PRIESTLEY J

Solicitors/Counsel:
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Manslaughter

[1] Gavin Horua, you pleaded guilty to a count of manslaughter on 2 June this year. That plea was entered by you on the morning of the third day of your trial for the charge of murder. The Crown in the circumstances, to which I shall refer briefly at a later stage, took the view that manslaughter was the more appropriate count to reflect your culpability. Manslaughter, as you know, is a serious charge and carries a maximum penalty of life imprisonment.

Description

[2] As I said, you originally faced a count of murder. The Crown, quite properly, considered that the blows which you inflicted on your victim's head were captured by s 167(b) of the Crimes Act 1961. Your victim was Ani Raukawa, aged 38, with whom you had been living in a domestic relationship for about eight months.

[3] On the night of 27 November 2009 a party took place at your home in Kaingaroa Village. The pretext for the party was to celebrate the birthday of a daughter of the deceased, although the daughter herself does not seem to have spent much time at the party. Various friends came around. Alcohol was consumed in considerable quantities in the back garden.

[4] Your victim was initially unwilling to consume alcohol because she had recently had a contraceptive injection and, from previous experience, considered that consuming alcohol would make her feel unwell. However, she did consume alcohol. The evidence at your trial was that she became somewhat unsteady on her feet and on one occasion fell backwards off a low garden seat, and on a second occasion had a fall in the kitchen. She then decided to go to bed. You assisted her in that.

[5] Some time afterwards she was visited in her bedroom by a whanau member with whom she had been close some years previously. You returned inside the house. The evidence of the man with her was that, at the time you glimpsed them through the doorway, they were embracing each other on the bed. Your perception was that there was a much greater degree of sexual intimacy involved. The whanau

member fled. You went into the bedroom and struck the victim while she was on the bed, dragged her into the hallway and inflicted blows on her, including possibly blows with your feet. Blows were certainly inflicted on her face. There were a number of bruises to her body. There were at least two blows to her head. There was bruising on her arm. It is not possible to say, as your counsel has correctly submitted, that all these bruises were inflicted by you when you were angry, but clearly the fatal blow was, as were the blows to her head.

[6] At some stage the victim was seen by a witness lying in the hallway of the home, naked apart from underwear around her legs. You were seen trying to pull the underwear up. You returned your victim to the bedroom, laid her on the bed and then sought help from a former partner of yours. You knew at that stage that you were in trouble.

[7] At the conclusion of the evidence from the pathologist, Dr Koelmeyer, the Crown decided to resolve matters on the basis of you pleading guilty to manslaughter. Dr Koelmeyer's evidence was to the effect that the cause of death was relatively rare. The blows or injuries which you inflicted on the deceased's head were all survivable. The cause of death was the severance of various nerves causing microscopic haemorrhaging in the front of the pontomedullary junction of the brain. This type of injury is attributable to hyper-extension of the head. The victim's intoxication would have disabled her protective bracing mechanisms with the result that when you inflicted a blow to her head, her head hyper-extended thus causing the fatal injury.

[8] To your credit Mr Horua you had, right from the time you were interviewed by the Police, accepted responsibility for your victim's death. Within two days of committal you indicated through your counsel that you were prepared to plead guilty to the lesser charge of manslaughter. Your counsel made a brief opening statement to the jury at your trial to that effect. The Crown accepts that the indication of a guilty plea to manslaughter was provided at an early opportunity and that you are entitled to a sentencing discount.

Victim impact statements

[9] I say something now about the victim impact statements. I have read all five of them. Two are from Ms Raukawa's parents. Her death has been deeply distressing to them and in both cases has triggered a marked deterioration in their health. There are also statements from your victim's sister and two of her children (by previous relationships). All statements speak of the grief which Ms Raukawa's death has caused to them. The whanau have been robbed of a vibrant and caring woman. Her untimely death has caused them lasting grief. Her loss is irreplaceable. Some statements fairly point out that Ms Raukawa was entitled to your protection; ought not to have been assaulted by you; and that you clearly have not responded to previous anger management programmes to which you have been subjected and with which some of the victim's whanau had helped.

[10] I note whilst dealing with the victim impact statements that you have made an offer of some form of restorative justice conference or meeting. However, the victim's whanau, understandably perhaps, are not interested in taking up that offer.

Personal circumstances and pre-sentence report

[11] I need to say something now about your personal circumstances and also the very helpful pre-sentence report which has been prepared on you.

[12] You are currently a 36 year old Maori man of Tuhoe descent. You have four young children from a previous relationship in respect of whom you enjoy some form of shared custody arrangement. Currently, of course, you no longer have any contact with your children. You ended that relationship because of domestic violence problems. You had been living with your current victim Ms Raukawa, as I have said, for approximately eight months.

[13] You had until recently had consistent employment in the logging industry. You were employed from 15 years of age. As a result of a childhood injury, however, you sustained blindness in your left eye and this made nightshift work difficult. In more recent times you were in receipt of a sickness benefit.

[14] You were quite candid to the probation officer about what occurred on the night of 27 November 2009. You had regularly been consuming large quantities of alcohol. You deny any gang affiliations.

[15] To the probation officer, and also in the letter you have written to me Mr Horua, you are clearly remorseful. You state you feel sadness for Ms Raukawa's whanau and also for your own children. You readily acknowledged that you have a proclivity for violent reaction. You stated that you did not intend seriously to harm the victim that night, using the rather alarming comment that you had apparently witnessed her being hit a lot worse in the past and recovering from those injuries.

[16] The pre-sentence report assesses your risk of re-offending as high. Despite previous attempts at rehabilitation you have a clear predisposition to use violence when faced with emotional conflict. You are aware of this. I note that various statements have been submitted to me by your own family. These statements speak reasonably highly of you. In observing your treatment of children, you have been described as an affectionate father and an affectionate man. I also note that your own mother, who died very recently, had an awful lot to contend with during your childhood. She too was the victim of a violent and abusive relationship. It is a great shame Mr Horua that the lessons from your childhood did not lead you to avoiding the type of behaviour which made things so miserable for your mother. Instead you seem to have chosen to follow the pattern of your father's behaviour.

[17] The pre-sentence report identifies key contributing factors as your propensity for violence, your alcohol abuse and your poor relationship skills. The report recommends that you be subjected to violence prevention and psychological counselling programmes.

[18] You have during the course of your 38 years accumulated 48 previous convictions. Some of those are significant for the purposes of my sentencing you today. Eleven convictions relate to breaching protection orders under the Domestic Violence Act. You have a 2008 conviction for assaulting a female. You have two convictions in 2005 for injuring with intent to injure and assault with intent to injure, and in 1998 a conviction for assaulting a police officer.

Purposes and principles of sentencing

[19] The relevant purposes and principles of the Sentencing Act in your particular case are largely self-evident. They include the need to hold your accountable; to promote in you a sense of responsibility for the harm caused; to denounce your conduct, and to deter others from committing similar offences. I must also take into consideration the fact that this offence involved actual violence, an attack to the head and your victim to some extent was vulnerable; those being aggravating features. Also, of course, I must not overlook the principle of trying to assist you with your rehabilitation.

Counsels' submissions

[20] I turn now to counsels' submissions. You have been well served Mr Horua by the efforts made on your behalf by your counsel Mr Lawson, and I am indebted to both counsel for the very helpful submissions they have made.

[21] Ms Gordon for the Crown seeks a start point in the range of eight to 10 years. She submits that there should be a small uplift to reflect your criminal history, to which I have referred. The Crown seeks a minimum period of imprisonment of 50% in respect of any finite sentence I might impose.

[22] The Crown submits that the victim was that night subjected to a sustained attack involving a reasonable level of violence and at least two blows to the head. Ms Gordon refers to disparity of height and weight between you and your victim.

[23] Mr Lawson for his part submits that a start point of between seven and eight years imprisonment is appropriate. He submits that I should give you as much discount as I possibly can for your early guilty plea and for your remorse. He submits that in assessing your overall culpability I should not overlook what triggered your assault on the victim that evening. In Mr Lawson's submission the end sentence I should impose should be somewhere between six and seven years. I suspect when looking at the gap between Mr Lawson's start point and end sentence he may have underestimated slightly the discount he has urged upon me.

[24] So what I need to do now Mr Horua is to craft a sentence which reflects all these many features.

Sentence

[25] It is not necessary in sentencing you today for me to embark on a lengthy exposition of difficulties Judges face when sentencing for manslaughter.

[26] It is trite law that there is no tariff for manslaughter sentences, and rightly so given the huge diversity of factual situations. Mr Lawson has referred me to *R v Tai*[1] where there is discussion by the Court of Appeal on the extent to which manslaughter sentencing involving serious violence might be assisted by the guideline judgment of *R v Taueki*.[2] Courts should strive for a degree of consistency. Although there are legitimate concerns about homicides where victims are women who have been seriously assaulted in domestic situations, the Court of Appeal in *R v Kengike*[3] three years ago was not prepared to lift sentencing levels in that area.

[27] I consider Ms Gordon was correct (there being no serious challenge by Mr Lawson in that regard) to refer me to *R v Ruru*,[4] *R v Hetherington*[5] and *R v Kengike*[6] as being the cases which, on their facts, are closest to these facts today. *Ruru* involved the killing of a de facto partner in a 20 year relationship where, after a drunken party, there were assaults on the head. A start point of eight years imprisonment was reduced to an end sentence of seven years. In *Hetherington* the victim was again a de facto partner. The pathological evidence was that a moderate degree of force had been used to cause injuries, possibly punching or kicking and possibly combined with a fall. A nine year sentence was upheld on appeal. In *Kengike* the Court of Appeal mandated a 10 year start point and an eight year end sentence where there had been a history of violence and the deceased had the benefit of a protection order when she was killed.

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1 *R v Tai* [2010] NZCA 598.
2 *R v Taueki* [2005] 3 NZLR 372 (CA).
3 *R v Kengike* [2008] NZCA 32.
4 *R v Ruru* CA371/02, 12 February 2002.
5 *R v Hetherington* CA28/02, 20 June 2002.
6 Supra.

[28] I record Mr Lawson has also referred me, in his written submissions, to *R v Kepu*[7] and *R v Blackmore*,[8] which were different in kind, with *Blackmore* (11 years) being at the high side of the scale, low level provocation and was a knife case leading to the Court of Appeal upholding an 11 year sentence. Mr Lawson submits, and correctly so, that there is lower level of culpability in this case today.

[29] One of the difficulties with the three Court of Appeal cases to which the Crown has referred is that the Court of Appeal has not strictly adopted the *Taueki* sentencing methodology (by that I mean start points followed by uplifts and credits for features personal to the offender as opposed to the offence). Instead the approach (unsurprising in part given that *Ruru* and *Hetherington* were cases decided before *Taueki*) has seized on a start point which reflects what would traditionally be regarded as personal aggravating features.

[30] I have a clear view of culpability here. The victim was defenceless, probably semi-clothed in bed. She was intoxicated at the time and thus more vulnerable. She was in the home which she shared with you, Mr Horua. You inflicted blows and almost certainly stood on her face, with the latter being inflicted when she was lying in a confined space in the hallway of your home. You assaulted her in a situation of vulnerability when you were enraged. A number of blows were inflicted on various parts of her body, although as I have said earlier it is not possible to attribute all the injuries observed on her to you.

[31] Placed into the mix when assessing culpability is a degree of outrage which you must have felt when you stumbled upon your partner in the bedroom engaging in some form of intimacy with another man. I had the benefit of hearing that man's evidence at trial. I have no reason to disbelieve his evidence that the couple were kissing and embracing at the time and not indulging in intercourse. How exactly the victim became undressed is problematic. I do not intend to speculate. Were you and she not heavily intoxicated at the time this tragedy may well not have occurred. Despite whatever benefits you may have gained from anger management courses, you totally lost it.

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7 *R v Kepu* [2011] NZCA 104.
8 *R v Blackmore* CA29/05, 18 May 2005.

[32] So factoring in all those features I consider an appropriate start point to reflect your culpability is one of seven and half years imprisonment. Your previous criminal history, however, is not to be overlooked. There were no convictions involving Ms Raukawa. However, a I have said, you have amassed 48 convictions which include convictions for violence including two of injuring or assaulting with intent to injure, one assault on a police officer, and one of male assaults female. Alarmingly you have 11 convictions amassed between 2005 and 2009 for contravening protection orders. This displays, in my view, a propensity to treat women with whom you live as you choose. I consider this criminal record to be a significant aggravating feature, in respect of which I intend to impose a 12 month uplift, bringing me to a sentence of eight and a half years imprisonment before reducing for mitigating factors.

[33] You were remorseful at a very early stage. I have read your letter to me which indicates that this remorse is not feigned by you. You were also prepared to accept criminal responsibility at a very early stage. Thus, from the eight and a half year figure I intend to give you a credit of two years and three months to reflect your guilty plea (or its early indication) plus your remorse. That equates to 26.5% which in terms of the Supreme Court judgment of *Hessell v R*[9] reflects both your guilty plea and your remorse, being legitimately seen as two discrete mitigating factors.

[34] Stand up please at this point. In respect of your conviction of manslaughter I thus sentence you to six years and three months imprisonment.

[35] The Crown seeks the imposition of a minimum term of imprisonment under s 86 of the Sentencing Act 2002 of 50%. Mr Lawson submits that the imposition of a minimum term is unnecessary.

[36] I note, without needing to cite them, that the imposition of minimum terms for manslaughter sentences is close to being routine. In terms of s 86(2) I consider that your release in terms of the Parole Act after a period of just over two years would be insufficient for the Sentencing Act purposes of denunciation, deterrence and holding you accountable. I do not consider that an imposition of minimum

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9 *Hessell v R* [2011] 1 NZLR 607 (SC).

terms of imprisonment flow from double counting, as your counsel has submitted. Section 86 is a discretionary exercise, mandated by Parliament to use in appropriate cases. This in my judgment is one. I therefore intend to impose on you, under s 86, a minimum term of imprisonment of three years.

[37] I also recommend that you be given the opportunity during imprisonment to undergo psychological counselling and to attend violence prevention programmes. This is recommended by the probation report. You have indicated you are willing.

[38] I of course appreciate that from the standpoint of Ms Raukawa's whanau they will inevitably regard both periods (six years three months, and three years) as inadequate given the loss they have suffered. I sympathise with that view which is often expressed in homicide sentencings and is uncritically reported by the media. However, my obligation is to sentence you Mr Horua according to law. Manslaughter is not the same as murder. This was an unintended killing in a situation fuelled by alcohol. I am satisfied that the sentence I have imposed is consistent with sentences imposed in similar situations and, importantly, is a sentence required by sound legal principles.

[39] Take him down.

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Priestley J